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October 25, 2019

BY ECF

The Honorable John G. Koeltl
United States District Court for the Southern District of New York
Daniel P. Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *Phyto Tech Corp. v. Givaudan SA*, 1:19-cv-09033-JGK
Pre-Motion Conference Request

Dear Judge Koeltl:

We represent Phyto Tech Corp. d/b/a Blue California ("Blue Cal") in the above-referenced action. We write pursuant to Section 2.B of Your Honor's Individual Rules of Practice to request a pre-motion conference in relation to two motions Blue Cal would like to file: (1) a motion under Rule 56 for the appointment of a Liquidating Trustee to wind up the affairs of BGN Tech LLC ("BGN"), a dissolved joint venture between Blue Cal and defendant Givaudan SA ("Givaudan") and (2) a motion under Rule 12(b)(6) to dismiss Givaudan's counterclaim for breach of contract.

By way of background, Blue Cal and Givaudan formed a joint venture, BGN, in 2014. The parties' relationship soured in 2018, spawning litigation in this Court as well as in the state courts of New York and California. In addition to this matter, this Court has pending before it two other related cases:

- *Givaudan SA v. Conagen Inc.*, No. 1:18-cv-03588-JGK (S.D.N.Y.)
- *Phyto Tech Corp. et al. v. Givaudan SA*, No. 1:18-cv-06172-JGK (S.D.N.Y.)

In addition, on December 20, 2018, Givaudan filed suit against Blue Cal before Your Honor, Civil Action No. 1:18-cv-12027-JGK, seeking to compel Blue Cal to participate in the selection of a Liquidating Trustee to wind up BGN. The parties agreed on Sherwood Partners, Inc. ("Sherwood") as the Liquidating Trustee, and Givaudan dismissed the case on May 3, 2019.

Following dismissal, the parties were unable to agree on the duties of the Liquidating Trustee and have reached an impasse. Blue Cal now seeks appointment of Sherwood under this Court's supervision. Givaudan now opposes appointment of a Liquidating Trustee and instead requests



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judgment “dismissing plaintiff’s Complaint with prejudice” (Dkt. No. 16, Answer to Complaint and Counterclaims, p. 11).

Delaware law and the BGN LLC Agreement provide for the appointment of a Liquidating Trustee under the equitable powers of the Court. We have provided Givaudan with a proposed form of appointment order (enclosed), but Givaudan has refused to comment on the order, other than to take the position that it can continue prosecuting New York and California derivative cases in the name of the dissolved BGN. As will be detailed in the motion, only the Liquidating Trustee can pursue such actions following dissolution, which has now occurred.

We hope that the appointment of a Liquidating Trustee will be a first step towards an overall resolution of the dispute. Accordingly, we respectfully request permission to move this Honorable Court to order the appointment of Sherwood as the Liquidating Trustee with the customary powers of a liquidating trustee and as provided in the attached proposed order. We propose to file a motion under Rule 56, which requires permission from the Court.

In addition, Blue Cal requests permission to file a motion to dismiss Givaudan’s counterclaim under Rule 12(b)(6). Givaudan claims that Blue Cal is unable to provide a post-wind up license to it as required under § 13.07 of the BGN Agreement. However, § 13.07(b)(ii) provides a detailed procedure for the negotiation of such a license, followed by arbitration. Givaudan has not pled compliance with that procedure or the dispute resolution provisions of the agreement. Nor have the parties engaged in the required arbitration. Givaudan’s claim for breach of contract therefore fails to state a claim and should be dismissed.

We thank Your Honor for your consideration of this matter.

Respectfully,

/s/ Katherine A. Helm

Katherine A. Helm

KAH/lmr

Enclosure

cc: All Counsel of Record (by ECF)